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No. 78-154

In the Supreme Court of the United States

OCTOBER TERM, 1978

ELECTRI-FLEX COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A67-A88) is reported at 570 F.2d 1327. The decision and order of the National Labor Relations Board (Pet. App. A1-A66) are reported at 228 NLRB 847.

JURISDICTION

The judgment of the court of appeals (Pet. App. A89-A92) was entered on June 6, 1978. The petition

for a writ of certiorari was filed on July 27, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner's unilateral implementation of a written-warning disciplinary system violated Section 8(a)(3), (5), and (1) of the National Labor Relations Act; that petitioner's unilateral implementation of a retroactive 60-day probationary period and a call-in rule violated Section 8(a)(5) and (1) of the Act; and that the application of the probationary period rule to the layoff of a union committeeman violated Section 8(a)(3) of the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3-4.

STATEMENT

1. The Union [1] began organizing petitioner's employees in June 1975; it won a Board-conducted election and was certified as the employees' representative in August of that year. Negotiations for a collective bargaining agreement began on September 26, but as of the close of the record in this case in

[1] District 122, International Association of Machinists and Aerospace Workers, AFL-CIO.

May 1976, the parties had not agreed on a contract.[2] (Pet. App. A6.)

The Board found that, during the negotiations, petitioner violated Section 8(a)(5) and (1) of the Act by unilaterally instituting a 60-day probationary period and a call-in rule, and violated Section 8(a)(5), (3), and (1) by unilaterally imposing a new warning and disciplinary system.[3]

[2] Beginning in June 1975, and continuing into 1976, petitioner engaged in a wide variety of activity aimed at discouraging support of the Union. Between June and September 1975, petitioner's supervisors coercively interrogated employees about their union sentiments and activities (and those of other employees), threatened employees with loss of benefits and other reprisals if they supported the Union, promised benefits for refusing to support the Union, threatened employees with reprisals for taking matters to the Board, created an impression of surveillance of union activities, and maintained lists of employees who supported and opposed the Union (Pet. App. A6-A18, A48). Moreover, in January 1976, petitioner's vice-president promised benefits to an employee in return for withdrawal of charges before the Board (Pet. App. A49-A59), and in February 1976, petitioner's manufacturing manager warned another employee not to file a charge with the Board (Pet. App. A12-A13). The Board found that petitioner's conduct violated Section 8(a)(1) of the Act, the court of appeals upheld its findings, and petitioner does not appear to contest these findings in this Court (Pet. App. A52-A53, A64-A65).

[3] The Board, upheld by the court of appeals, also found that petitioner violated Section 8(a)(3) and (1) of the Act by transferring, laying off or discharging employees Velez, Ibarra, Martin, Marrero and Capasso in retaliation for their union activities. (Pet. App. A32, A34, A41, A46.) Petitioner contends that these findings are not supported by "substan-

The facts relating to these violations follow:

a. Written warnings.

Prior to the August representation election, petitioner rarely issued formal written warnings to its employees. Indeed, between January 1972 and the election, no more than 15 such warnings were issued, nearly all for safety violations. (Pet. App. A19, A73; Pet. 27-29; Tr. 993-994.)[4] Starting on the day of the election, however, petitioner began issuing written notices at an unprecedented rate—between August 7, 1975, and the commencement of the hearing in April 1976, 147 such written warnings were issued. (Pet. App. A20, A28-A29; Tr. 834-838.) In some cases, supervisors told employees that written warnings were being issued because of the presence of the Union (Pet. App. A20-A21; Tr. 133-134, 437-439, 444-446). Thus, manufacturing manager Mario Colosi told Superintendent Larry Bonner that the Union could be overthrown if its supporters could be eliminated, to which Bonner replied, "[Y]ou just can't go around and fire Union people. You have to give them warning slips or the Union will just get them their jobs back." (Pet. App. A20; Tr. 447.)

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tial evidence" but defers addressing this contention until "the issuance of a writ of certiorari" (Pet. 14).

The Board's finding that six additional employees were unlawfully laid off was not upheld by the court of appeals and is not in issue here (Pet. App. A52, A65, A88).

[4] "Tr." refers to the transcript before the Administrative Law Judge.

In mid-September Union business representative Frank Haderly learned of the increase in written notices and promptly raised the issue with petitioner's vice president, Bruce Kinander. Kinander assured Haderly that the notices were "just to advise [employees of their] shortcomings" and would "in no way" be used for disciplinary or discharge purposes. Haderly responded that if that was the only purpose of the written notices, he had no objection (Pet. App. A21-A22; Tr. 67, 101, 920-921, 1328-1329). However, at the hearing petitioner maintained that it at all times intended to use the slips for disciplinary purposes (Pet. App. A21-A22).

b. Marrero layoff.

In January 1976, while negotiations were still in progress, petitioner presented the Union with a plan for laying off 30 employees according to seniority, a move necessitated by economic circumstances. Included on the list was Ignacio Marrero, one of the three Union committeemen. Marrero protested that he had sufficient seniority to avoid a layoff, and five days later petitioner presented a revised layoff list to the Union, without Marrero's name. (Pet. App. A34; Tr. 75, 77, 80-84, 105-106, 938-942, 1032.) However, a week later petitioner claimed that because Marrero had not worked for 60 days following his original date of hire, his seniority date placed him within the laid-off group. Petitioner's claim was based on a tentatively agreed-upon term in the as yet unratified contract which provided that employees

must complete a 60-day probationary period before they could acquire seniority rights. Marrero was laid off over the Union's protest that the contract had not yet been ratified by its membership (a requirement that the Union repeatedly placed on the final acceptance of any of the contract's terms) and that, in any event, there was no agreement to apply the 60-day probationary period retroactively or to the layoff at issue. (Pet. App. A35-A37; Tr. 84, 86, 242, 939, 1499-1500.)

c. Call-in rule.

About three-quarters of petitioner's employees are Spanish-speaking, and many speak no English at all (Pet. App. A4; Tr. 54). Prior to the advent of the Union, petitioner required employees to call in if they could not come to work. The Spanish version of the rule made no mention of any time by which such a call must be made, although the English version said 9:00 a.m. (Pet. App. A23; Tr. 1128-1130). Beginning in late September petitioner began issuing warning notices to employees for failing to call in by 9:00 a.m. (Pet. App. A23, A79; Tr. 229, 1130-1131).[5]

[5] Thus employee Uelsmann received a warning notice on October 1 because he was ten minutes late and had not given the Company advance notice pursuant to the call-in rule. Foreman Brilz told him that if he was going to be absent he had to call in by a certain time and that "the Company has to give these out now * * * [t]hey have to protect themselves from the Union." (Pet. App. A20; Tr. 444-446.) Uelsmann received another warning notice in December, and Brilz again said that the Company was issuing the notices to guard against the Union (Pet. App. A21; Tr. 445).

Manager Colosi gave employee Rivera his first warning notice and a three day suspension for failing to call in and told him, "[Y]ou guys brought the union here, that's what you guys get here for bringing in the union" (Tr. 133-134).

2. Rejecting petitioner's assertion that in instituting the system of written warning slips "it was merely refining, adjusting, and improving the use of procedures previously employed" (Pet. App. A61), the Board, adopting the Administrative Law Judge's finding on the point, concluded that the drastic increase in the use of written warnings for disciplinary purposes constituted "a brand new system which [petitioner] put in, both to protect itself where it meted out discipline, and to harass some of the union supporters," and to which "[c]ertainly the Union did not agree" (Pet. App. A24).[6]

Concluding that petitioner's unilateral institution of the 60-day probationary period and the call-in was unlawful,[7] the Board explained (Pet. App. A62-A63; footnotes omitted):

[6] The Board agreed with the Law Judge that petitioner's unilateral action violated Section 8(a)(5) of the Act, but found, in addition, that since petitioner was motivated by an intent to retaliate against the employees' selection of the Union, the imposition of the warning system also violated Section 8(b)(3) of the Act (Pet. App. A-59-A61).

[7] The Board agreed with the Law Judge that the application of the new rule to Union Committeeman Marrero's layoff was a "subterfuge" which violated Section 8(a)(3) of the Act. The Law Judge did not make a finding that the institution of the two provisions violated Section 8(a)(5) of the Act. (Pet. App. A37, A62 n. 5.)

We agree with the Administrative Law Judge that prior to the institution of the 60-day probationary period provision on February 5, 1976, [petitioner] and the Union agreed to a layoff and seniority list, without mention or consideration of the 60-day probationary period. With respect to the call-in rule, the evidence shows that it was instituted in about December 1975, and was thereafter applied to employees by means of the written warning notice-discipline system. Prior to the application of the tentatively agreed to call-in rule, and since the institution of the written warning notice-discipline system after the election, [petitioner] had applied a 9 a.m. call-in rule. [Petitioner] neither informed employees of the call-in rule prior to its application by means of the disciplinary system, nor of the 60-day probationary period prior to its application to Marrero and the other six employees.

Although these provisions had been tentatively agreed to in negotiations between [petitioner] and the Union, negotiations had not been completed and the contract had not been submitted for ratification, a condition which Union Business Representative Haderly clearly made a condition precedent to final agreement on a contract. Further, there was never any agreement between the parties that particular contract provisions could be implemented nor was there any agreement between the parties that contract provisions would be implemented as soon as they were tentatively agreed upon.

3. In upholding the Board's conclusions, the court of appeals rejected, as unsupported by the evidence, petitioner's contentions that the system of written

warnings was not a substantial change in its existing practice (Pet. App. A73-A74), and that the call-in system was a relaxation of a stricter rule which had previously been in effect (Pet. App. A79-A80).

The court also rejected petitioner's contention that the Union had waived by inaction its objections to the warning system or that it had agreed to it, pointing out that the Union had not learned of the change until mid-September, had promptly raised the issue with petitioner, and had agreed to the warning system only on petitioner's representation that it would not be used for disciplinary purposes (Pet. App. A74-A75).

Finally, the court found no merit in petitioner's contention that, because the call-in rule and the 60-day probationary period had been agreed to by the Union in the bargaining negotiations, petitioner was entitled to institute those provisions at will. The court stated (Pet. App. A80-A81; footnote omitted):

> We express no opinion as to what the result might have been had the parties been silent as to the time and method of implementation for the tentative provisions, and the employees had been notified prior to the implementation of the changes, but that is not the situation here.
>
> * * * [W]e find that because there had been no agreement nor understanding that tentatively approved proposals were to go into immediate effect, there was the possibility that further revisions would or could be made before ratification and implementation of the provision, thus bargaining may not have been completed on the provisions. We find that there was sufficient

evidence for the Board to conclude that the implementation of the call-in rule was a violation of Section 8(a)(5).

The court added that, in any event, no agreement on the effective date of the institution of the probationary period had been reached, the Union did not agree to apply it to the lay-off in question, and the evidence supported the Board's finding that its application to Marrero was in retaliation for his union activism (Pet. App. A85).

ARGUMENT

1. Petitioner essentially urges that it did not violate the duty to bargain by piecemeal implementation of working conditions which had been tentatively agreed upon in bargaining negotiations.[8] There is no merit to this contention.

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[8] Petitioner's alternative contentions that the warning system did not constitute a change from existing procedure (Pet. 26-32), that the call-in system was actually a relaxation of the existing rule (Pet. 24-25), and that the 60-day rule was not discriminatorily applied to Marrero (Pet. 19-23) raise factual issues which do not warrant this Court's review. In any event, as shown above, the Board's findings on these points are amply supported by the record.

Petitioner's contention that the written warning policy was not instituted in retaliation for the employees' union activities in violation of Section 8(a)(3) of the Act (Pet. 29-32) also raises only a factual issue. Petitioner objects particularly to the Board's reliance on the Bonner-Colosi conversation (see *supra* at p. 4), insisting that it had been denied (Pet. 31). However, Bonner failed to testify at the hearing, and Colosi would say no more than that he did not "recall" the conversation (Tr. 1483-1484).

To the extent that petitioner argues (Pet. 25-26) that the Union did not object to, or acquiesced in, the piecemeal implementation procedure, petitioner merely quarrels with the Board's and the court's contrary finding, an issue which does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

To the extent that petitioner urges that it had a right to take such action despite the Union's disapproval, the authorities it relies upon stand for no such result. It is settled that the duty to bargain includes the obligation to refrain from unilaterally changing established terms and conditions of employment without first consulting and bargaining with the employees' bargaining representative, and that such unilateral action constitutes a violation of Section 8(a)(5) and (1) of the Act regardless of the employer's motivation. *National Labor Relations Board* v. *Katz*,[9] 369 U.S. 736, 743, 747; *National Labor*

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[9] Petitioner's reliance on *Katz* is misplaced since the terms of the contract here were not final, but rather were subject to change until the entire contract was ratified; thus, as in *Katz*, petitioner's "unilateral change in conditions of employment under negotiation [was] * * * a violation of § 8(a)(5)" (369 U.S. at 743). Similarly, the *dictum* in *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224, lends no support to petitioner's position, since in that case impasse had been reached prior to the unilateral changes (337 U.S. at 218, 222). Therefore, the statement that an employer might properly impose a unilateral change where the change implemented a term already offered pertained only to post-impasse situations. Here, on the other hand, no impasse had been reached. See *Katz*, *supra*, 369 U.S. at 743 n. 11. And in *National Labor Relations Board* v. *Bradley Washfountain*

Relations Board v. *C & C Plywood Corp.*, 385 U.S. 421, 425-430. The application of that principle has particular force here, because the changes put into effect were less favorable to employees than those in existence, and the warning system and application of the 60-day probation period to Marrero were animated by anti-union considerations.

Co., 192 F.2d 144 (C.A. 7), the court of appeals simply held that where the union is consulted by the employer prior to pre-contract implementation of provisions and does not object, that implementation is not unlawful. 192 F.2d at 148, 151. Here, however, neither the employees nor the Union were consulted prior to unilateral implementation, and objections were made when the Union discovered what was happening (Pet. App. A80-A81).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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